

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)**

**NO: SDRCC DT 18-0291
(DOPING TRIBUNAL)**

**CANADIAN CENTRE FOR ETHICS IN
SPORT (CCES)**

AND

DOMINIKA JAMNICKY (Athlete)

AND

TRIATHLON CANADA

AND

**GOVERNMENT OF CANADA
WORLD ANTI-DOPING AGENCY (WADA)
(Observers)**

Before:

The Hon. L. Yves Fortier, QC (Arbitrator)

Appearances and Attendances:

On behalf of the CCES:

Mr. Kevin Bean, CCES
Mr. David Lech, CCES
Ms. Luisa Ritacca, legal representative
Mr. Justin Safayeni, legal representative

On behalf of the Athlete:

Ms. Dominika Jamnicky, athlete
Mr. James D. Bunting, legal representative
Ms. Sarah Boyle, legal representative

FINAL AWARD

16 August 2019

I. INTRODUCTION

1. I recall that the Parties, in the present case, agreed to bifurcate the proceedings into two Stages in the following terms:
 - (a) Stage 1- All evidence is adduced on all issues. The Arbitrator will address the issue of source and will decide (i) whether the Athlete acted without intent, and (ii) whether she bears No Fault; and
 - (b) Stage 2 – The Parties will make submissions as to the consequences that should follow from the Award rendered at Stage 1. This includes whether an anti-doping rule violation should be recorded; and, if yes [sic], the appropriate sanction (if any), including whether the Athlete bears No Significant Fault.¹

2. I also recall that, on 31 May 2019, I issued a Partial Final Award in respect of Stage 1. I then concluded and found as follows:

182. On these grounds, I find the following at this Stage:

1. The Athlete has not discharged her burden of proving the source of her AAF [Adverse Analytical Finding];
2. The Athlete has discharged her burden of proving that her AAF was not intentional.

183. As agreed by the Parties, the Parties will now make submissions, in accordance with a calendar to be agreed within 21 days from the date of this Partial Final Award, as to the consequences that should follow from the present Partial Award.²

3. In accordance with the calendar subsequently agreed by the Parties,

- The Athlete provided written submissions on 21 June 2019;
- The CCES provided written submissions on 5 July 2019; and
- The Athlete provided written reply submissions on 9 July 2019.

II. PARTIES' SUBMISSIONS

A. ATHLETE'S POSITION

4. Starting from the premise that, in my Partial Final Award, I have found that the Athlete “[was] not a drug cheat” and anticipating (correctly) that the CCES “will argue that the

¹ See Partial Final Award at page 4.

² See Partial Final Award at page 49.

minimum sanction available for Domi [the Athlete] is two years under CADP [Canadian Anti-Doping Program, the “CADP” or the “Program”] Rule 10.2.2” --- and “that Domi cannot rely on the No Fault (CADP 10.4), No Significant Fault (CADP 10.5.2.) or Contaminated Product (CADP 10.5.1.2.) provisions to reduce or eliminate her period of ineligibility because Domi has failed to establish the source of her AAF”, the Athlete concludes that

[t]he CCES’ anticipated approach is draconian, unfair, follows an unnecessarily restrictive interpretation of the CADP (and the WADA [World Anti-Doping Agency] Code) and ignores the fundamentally important principle of proportionality that is deeply ingrained in the *lex sportiva*.³

5. Athletes, argues counsel for the Athlete, “cannot be held to a standard that is impossible to meet”.⁴
6. In order to ensure a just outcome and avoid the profound unfairness that would follow from the strict and inflexible reading of the Program that the CCES will request, counsel for the Athlete argues that I have two options:

First, the Arbitrator can interpret the CADP broadly and purposefully in accordance with its intent such that either the No Fault or Contaminated Product provisions are invoked in this case to protect Domi from an unfair result, as those provisions were intended to be used by their drafters. The learned Arbitrator has found as a matter of fact that Domi’s AAF resulted from meat or a Contaminated Product. Domi submits that it is open to the Arbitrator to conclude in these circumstances that Domi has, for the purpose of the No Fault provision, established how clostebol entered into her system in that there are two explanations and Domi bears no fault in the circumstances of her case for either of those two possible causes.

In the alternative, Domi should at least be entitled to the protection of the Contaminated Product provision. If the learned Arbitrator concludes he is unable to make a No Fault finding, Domi should be entitled, for the purpose of assessing what consequence should be imposed on her, to a determination that her AAF was caused by the consumption of a Contaminated Product (not meat). Those provisions can then be applied to reduce her period of ineligibility from two years to a reprimand (or some other minimal period of ineligibility).

³ Written Argument of the Athlete, 21 June 2019, at p. 4.

⁴ Ibid at p. 7.

“Second, if the Arbitrator concludes that the minimum sanction available under the CADP is two years (as the CCES will argue), the well-established principle of proportionality should be applied to reduce the minimum two year sanction that would apply under the CADP to a reprimand (or some other minimal period of ineligibility).⁵ [Emphasis in citation]

7. The Athlete concludes that I should:

- (a) Interpret the rules broadly and order either (i) No Fault, or (ii) a reprimand under the Contaminated Product provisions; or
- (b) Apply the principle of proportionality to reduce Domi’s sanction to a reprimand.

In the alternative, if a sanction were to be imposed it should certainly be less than the time Domi has already served under the Provisional Suspension and she should be immediately eligible for competition.⁶

B. CCES’ POSITION

8. As anticipated by the Athlete, the CCES, in its Closing Submission, argues that, in the circumstances of this case, and in the light of my findings in the Partial Final Award, the Program Rules are clear as to the required sanction. In the words of counsel for the CCES:

The *Athlete* satisfied this Tribunal that her anti-doping rule violation was not intentional, but without proving the source of clostebol in her system she cannot establish she acted with *No Fault* or *No Significant Fault*. The applicable sanction is a two-year period of *Ineligibility*.⁷

- 9. After noting the Athlete’s central submission that she bears No Fault for the Clostebol in her system (or, in the alternative, a “negligible” degree of Fault), the CCES responds that the Athlete’s key premise “is fundamentally flawed” because, as she has failed to establish how Clostebol entered her system, it is logically impossible for me to assess her degree of fault.
- 10. Referring to a long line of jurisprudence from the Court of Arbitration for Sport (CAS), the CCES counsel affirms that “[t]he need to prove source of ingestion before assessing *Fault* flows from the very nature of the *Fault* inquiry” and that “[o]nce it is accepted that

⁵ Ibid at pages 7-8.

⁶ Ibid at page 12.

⁷ CCES Brief of 5 July 2019, at page 2.

the *Athlete*'s degree of *Fault* is indeterminable, the entire basis for the *Athlete*'s arguments in favour of sanction reduction in this case disappears".⁸

11. With respect to proportionality submits the CCES, the "source identification requirement" has never been found to be disproportionate, despite numerous challenges.

12. Counsel for the CCES concludes as follows:

Acceding to the *Athlete*'s request for relief in this case would be tantamount to rewriting the clear text of the CADP Rules rather than enforcing them. To maintain the integrity of the anti-doping regime, CAS has noted that the appropriate role of an anti-doping tribunal is "to apply the [Rules] as written, not to disregard its clear and unambiguous express terms even if their application to the particular facts results in a harsh sanction and other corresponding adverse consequences to an athlete".⁹

13. The CCES takes issue with the Athlete's characterization of one of my findings in the Partial Final Award. Counsel for the CCES writes that I never concluded that the Athlete's AAF was caused by one of only two possible explanations, meat or a contaminated product.

To be clear, the Partial Final Award contemplates that the clostebol in the *Athlete*'s system may have also come from a product that is not a *Contaminated Product* at all [...].¹⁰

14. However, writes the CCES, whichever interpretation one adopts, "failure to identify the source of *clostebol* is fatal"¹¹, and "[a]ccepting that she [the Athlete] bears No Fault (or only a very low degree of Fault) calls for speculation upon speculation, constructing on imaginary product contamination scenario in a factual vacuum, with absolutely no evidentiary basis".¹²

15. The CCES concludes and requests the following order:

(a) a finding that the *Athlete* has committed an anti-doping rule violation;

⁸ Ibid at page 5.

⁹ Ibid at page 4.

¹⁰ Ibid at page 8. I will revert to these different interpretations of my Partial final Award in the Analysis section of this Final Award.

¹¹ Ibid at page 8.

¹² Ibid at page 13.

- (b) the *Athlete* be subject to a period of *Ineligibility* of two years starting on May 18, 2018 (when the *Athlete* signed her voluntary provisional suspension); and
- (c) *Disqualification* of the *Athlete's* results in all *Competitions* subsequent to *Sample* collection on April 24, 2018.¹³
16. I note that, in the very last paragraph of its Closing Submission, the CCES suggested that the Athlete had failed to take adequate steps to determine the source of her AAF. The CCES asserted the following:
- Ultimately, the fact that the *Athlete* has been unable to discharge that burden here is, in part, a function of her election to pursue a highly improbable explanation for clostebol, with limited investigation or fact-finding vis-à-vis that particular theory. (Recall that the *Athlete* made absolutely no inquiries of any meat vendor or supplier in Canada or Australia.) She could have put those resources towards pursuing other possible sources of clostebol that were equally or more likely – but such sources may also have been more susceptible to a finding of some degree of *Fault*. In the result, this Tribunal is left without the ability to evaluate the *Athlete's* degree of *Fault*, and certainly cannot safely conclude that she bears none (or very little). Proportionality cannot operate to save the *Athlete* from the clear consequences of the CADP Rules in these circumstances.¹⁴
17. As was to be expected, the Athlete took vigorous issue with this submission of the CCES and exercised her option to file a Reply Submission on 9 July 2019.
18. This submission of the CCES “[was] inappropriate” wrote the Athlete in her Reply, adding that “failing to meet her burden is one thing, but it is another thing entirely to suggest, as the CCES now does, that she failed to take adequate or meaningful steps to determine the source of her AAF”.¹⁵

III: THE APPLICABLE LAW

19. The Applicable Law is set out in section IV of the Partial Final Award with the exception of Rule 10.2.2. of the Program Rules which provides as follows:

If Rule 10.2.1 does not apply, the period of *Ineligibility* shall be two years.

¹³ Ibid at page 21.

¹⁴ Ibid at page 21, para 50.

¹⁵ Reply Argument of the Athlete 9 July 2019, at page 1, paras 3 and 4.

IV: ANALYSIS

A) Anti-Doping Rule Violation

20. The sole issue which I have to determine in this second and last Stage of the present arbitration is “the consequences that should follow” from my findings in the Partial Final Award.
21. At the outset, it is important to recall that the Athlete never contested the results of her urine sample analysis which confirmed the presence of Clostebol and which, she asserted, was due to her ingestion of contaminated meat in Canada or Australia.¹⁶
22. In addition, the Athlete has always acknowledged that she bore the burden of proving, on the balance of probabilities, the source of Clostebol in her urine.
23. After having reviewed and weighted the totality of the evidence, I concluded in my Partial Final Award, that “the Athlete [had] not met her burden of proving to me that contaminated meat was the source of her AAF”.¹⁷
24. Accordingly, I come to the issue of the sanction to be imposed on the Athlete informed by my finding that her contaminated meat “defense” has failed.
25. Whether I have excluded one or more possible explanations as the cause of her AAF is of no moment to my determination of her sanction. The Athlete selected her defense. Her burden was to prove a “single probable source of ingestion”. She has not discharged her burden.
26. The question which I must now answer is whether, in these circumstances, I can apply the No Fault or No Significant Fault provisions of the Program to eliminate or reduce her period of ineligibility.
27. The CCES submits, with references to numerous decisions of CAS Panels, that, since the Athlete has not proven the source of the Clostebol in her system, I cannot assess her degree of fault.

¹⁶ Partial Final Award para 37.

¹⁷ Ibid at para 164.

28. I agree. The need to prove source of ingestion before assessing fault flows from the very nature of the Fault inquiry. The Program Rules to which the CCES refers me are very clear:

Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an *Athlete* or other *Person*'s degree of *Fault* include, for example, the *Athlete*'s or other *Person*'s experience, whether the *Athlete* or other *Person* is a *Minor*, special considerations such as impairment, the degree of risk that should have been perceived by the *Athlete* and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the *Athlete*'s or other *Person*'s degree of *Fault*, the circumstances considered must be specific and relevant to explain the *Athlete*'s or other *Person*'s departure from the expected standard of behavior.¹⁸

29. A long line of CAS jurisprudence has established that it is logically impossible to assess fault if the Athlete fails to provide an explanation, with supporting evidence accepted by the Tribunal, as to how the prohibited substance entered her system.
30. I echo and adopt the words of Sole Arbitrator Lars Halgreen in a recent CAS decision that it is simply unfeasible to discuss a reduction of the mandatory period of ineligibility based on the Athlete's "No significant Fault or Negligence" if what actually caused the detection of Clostebol in her system has not been substantiated.¹⁹
31. The Athlete has not persuaded me that I have any discretion to interpret the Program Rules "broadly and purposefully and in accordance with [their] intent". The Rules are crystal clear and leave me with no room, even if I was minded to do so (which I am not), to rewrite or read into the Rules any words which could "protect Domi from an unfair result".
32. The Athlete's alternative submission that her AAF was caused by the consumption of a contaminated product, other than meat, fares no better. While in my Partial Final Award I found that I could not exclude the contaminated product Pathway as the source of the Athlete's AAF²⁰, I did not make a positive determination that her AAF was caused by the consumption of any contaminated product.

¹⁸ See CADP Rules, Part C (Definitions).

¹⁹ CAS 2016/A/4563 at para 63.

²⁰ See Partial Final Award at para 163.

33. Accordingly, it appears as if I have no alternative but to conclude that the Athlete has committed an anti-doping rule violation and that, in accordance with Rule 10.2.2 of the Program, she is ineligible for a period of two years.

B) Proportionality

34. However, as noted earlier, the Athlete submits that, before reaching a definitive conclusion in respect of her period of ineligibility, I should conduct the test for proportionality which she has raised and determine whether, in the exceptional circumstances of this case, the two-year sanction provided by the Program is proportionate.
35. I am mindful of the decision of Arbitrator Brunet in *CCES v. Maheu*, wherein he opined that “[u]nder the 2015 Code [2015 WADA Code], the principle of proportionality has been eliminated, to be replaced by a binary analysis of the “significance” of the fault or negligence with respect to Specified Substances, to be evaluated by the Tribunal.”²¹
36. However, as noted by the Athlete’s counsel, the comments of the distinguished arbitrator in that case were specifically directed at the application of No Significant Fault to a specified substance as the Athlete had proven the source of that substance in his system.²²
37. In the instant case, the 2015 WADA Code does not include a mechanism for a proportionate assessment of an athlete’s degree of fault where the Athlete has failed to prove the source of the prohibited substance in her urine. The minimum mandatory sanction is two years.
38. Having reviewed carefully all of the decisions addressing proportionality to which I have been referred by the Parties, both pre and post 2015 WADA Code, I have formed the view that, since it has been pleaded by the Athlete, it is my duty to consider and analyze whether, in the instant case, the two-year sanction is proportionate or not.
39. I enter into this analysis with the premise that the 2015 WADA Code has been drafted with proportionality in mind and that its sanctioning regime should, in all but the most exceptional cases, be able to pass the proportionality test.

²¹ SDRCC DT 15-0239, at para 196.

²² See footnote 10 at p. 9 of the Written Argument of the Athlete of 21 June 2019.

40. The question which I must answer is the following: is the present case one of those truly exceptional cases?
41. In order to answer this question, I recall that, in her Will-Say Statement, the Athlete testified that she was a member of the CCES Registered Testing Pool, had been tested 22 times prior to her AAF on 24 April 2018, and had never tested positive.²³ This was never contested by the CCES.
42. I have also reviewed some of my findings in the Partial Final Award which lead me to conclude that the Athlete has discharged her burden of proving that her AAF was not intentional. These findings are:
 171. The credibility of Ms. Jamnicky is a question of fact. When she testified, I listened to her very carefully. I looked at her demeanor. I also took into consideration her history as a mentor and coach to young athletes.
 172. I formed the opinion that she was honest, truthful and credible as corroborated by MM. Liang and Boorsma. I agree with her counsel that this is the most important factor that I need to consider in reaching a conclusion as to his client's intent.
 174. Accordingly, this is one of these rare cases where the Athlete has persuaded the Doping Tribunal that, although she has been unable to prove to my satisfaction the source of her AAF, she has persuaded me that her ADRV [anti-doping rule violation] was not intentional.
 178. [...] There is ample evidence on the record that the Athlete was very careful about what she ingests. Before taking any new supplement, she consulted with Dr. Mountjoy.
 179. I see no evidence of recklessness in this case on the part of the Athlete.
43. In summary, the evidence which I accepted in my Partial Final Award was that the Athlete, prior to testing positive on 24 April 2018, had had an unblemished anti-doping record as a member of the CCES Registered Testing Pool, was a mentor and coach to young athletes and an ambassador for drug-free sport. I also found her to be an "honest, truthful and credible witness".
44. In respect of the Athlete's intent, the CCES accepted during the hearing that the Athlete never "engaged in conduct which she knew constituted an ADRV".²⁴

²³ Partial Final Award, at para 34.1.

²⁴ Ibid at para 175.

45. I also recall that at no time during these proceedings has the CCES put forward its own theory as to what caused the Athlete's AAF detected in such minuscule quantity on 24 April 2018.
46. In these circumstances, do I have any latitude to apply the principle of proportionality and reduce the mandatory sanction of two years?
47. According to the CCES, the CAS panel in the well-known *Guerrero v. FIFA* case (on which the CCES relies heavily) answered my question in the negative when it wrote the following:
 89. The Panel is conscious of the much-quoted legal adage “Hard cases make bad law”, and the Panel cannot be tempted to breach the boundaries of the WADC (or FIFA ADR) because their application in a particular case may bear harshly on a particular individual. Legal certainty is an important principle (sic) to depart from the WADC would be destructive of it and involve endless debate as to when in future such departure would be warranted. A trickle could thus become a torrent; and the exceptional mutate into the norm.
 90. It is in the Panel’s view better, indeed necessary, for it to adhere to the WADC. If change is required, that is for a legislative body in the iterative process of review of the WADC, not an adjudicative body which has to apply the *lex lata*, and not some version of the *lex ferenda*.²⁵
48. On the other hand, in support of the application of the principle of proportionality, the Athlete’s counsel refers me, *inter alia*, to the no less well-known case of *Puerta v. ITF*, in which the Tribunal stated:
 - 11.7.17. It is undoubtedly, and commendably, the aim of WADA and of the signatories to the WADC to ensure that the WADC established a coherent and reasonable policy for sanctioning athletes who were found to have broken anti-doping regulations, and thereby cheated both their fellow athletes and the sporting public at large. The Panel has no doubt that the WADC has achieved that aim admirably, and is an invaluable tool in the fight against doping. Indeed, in all but the very rare case, the WADC imposes a regime that, in the Panel’s view, provides a just and proportionate sanction, and one in which, by giving the athlete the opportunity to prove either “No Fault or Negligence” or “No Significant Fault or Negligence”, the particular circumstances of an individual case can be properly taken into account.
 - 11.7.18. But the problem with any “one size fits all” solution is that there are inevitably going to be instances in which the one size does not fit all.

²⁵ *Guerrero v FIFA*, CAS 2018/A/5546 at paras 89-90.

The Panel makes no apology for repeating its view that the WADC works admirably in all but the very rare case. It is, however, in the very rare case that the imposition of the WADC sanction will produce a result that is neither just nor proportionate. It is argued by some that this is an inevitable result of the need to wage a remorseless war against doping in sport, and that in any war there will be the occasional innocent victim. There may be innocent victims in wars where bullets fly, but the Panel is not persuaded that the analogy is appropriate nor that it is necessary for there to be undeserving victims in the war against doping. It is a hard war, and to fight it requires eternal vigilance, but no matter how hard the war, it is incumbent on those who wage it to avoid, so far as is possible, exacting unjust and disproportionate retribution.²⁶

49. I am mindful of the fact that the decision in that case was issued in 2006 when the 2003 WADA Code was in force and that case law pursuant to pre 2015 iterations of the WADA Code must be applied with caution.
50. But with the utmost respect for the contrary view, I am of the opinion that the minimum sanction of two years provided for by the 2015 WADA Code in the present case is not immune to judicial scrutiny as was done by the Panel in the *Puerta* decision. In my view, an anti-doping sanction must be consistent with the principle of proportionality which can only mean that the severity of a penalty must be in proportion with the seriousness of the infringement.²⁷
51. I accept, of course, that, as reflected in CAS case law, a reduction of an otherwise applicable sanction can only be applied “in truly exceptional circumstances”.
52. I have formed the view that this is one of those truly exceptional cases. Having reviewed and weighted the totality of the evidence, I am firmly convinced that a mandatory two-year sanction of ineligibility for the Athlete is neither just nor proportionate.
53. Taking into consideration the specific circumstances of this case, I have concluded that a period of ineligibility of two years would be wholly unfair and an excessively severe sanction disproportionate to the behavior penalized, to wit, being unable to “discharge her

²⁶ *Puerta v ITF*, CAS 2006/A/1025, at paras 11.7.17-11.7.18. See also *The Football Association v Mr. Jake Livermore*, Decision of the Regulatory Commission of the Football Association dated September 8, 2015, citing to *Puerta* at para 29.

²⁷ I find it interesting to note that, as cited by the Athlete’s counsel in footnote 10 of his Written Argument of 21 June 2019, the CCES, in its written argument filed in *CCES v. Maheu* at page 11, asserted that “the principle of proportionality only applies when the minimum sanction available to an athlete is inadequate or unfair” [Emphasis in citation].

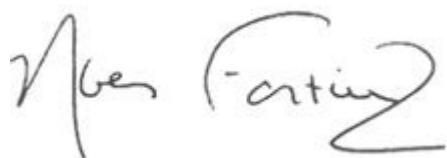
burden of proving the source of her AAF” and even though, as a result, I have been unable to assess her degree of fault.

54. Accordingly, I have decided to reduce the two-year sanction that would apply under the Program to a reprimand.

V. Decision

55. On these grounds, I find that:
 - a) The Athlete has committed an anti-doping rule violation.
 - b) The Athlete’s sanction is reduced to a reprimand.

Signed in Montreal this 16 day of August 2019.

A handwritten signature in black ink, appearing to read "Yves Fortier". The signature is fluid and cursive, with "Yves" on top and "Fortier" below it, though the lines are somewhat connected.

The Hon. L. Yves Fortier, QC, Sole Arbitrator